ENTERTAINMENT OR ENTERPRISE? (LAW AND AMERICAN COMMERCIAL THEATRE)

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There exists a great and easily noticeable difference between American and European theatre, which has arisen because of the different environments in which they have developed. In European countries there was always a sponsor (e.g.: state, king, aristocracy, church or city) who wanted to finance and protect the theatre groups. In the United States, however, the theatre had no such sponsor and was regarded as a kind of enterprise for generating income and paying taxes. Therefore it was a real challenge for the manager to create a performance that could attract enough people to enable him to pay the wages of his actors and actresses and all the taxes and fees imposed on the theatre. One of the best known features of modern American culture is Broadway theatre, with its enormously high production costs and incredibly high profits. It is the general opinion of theatre critics that contemporary Broadway theatre avoids artistic experiments because of the production costs. The main reason why the costs are so high is the amount of money producers have to pay the actors. The roots of such a situation can be found in the history of the regulations concerning theatre managers, actors and the audience.[1]

This situation influenced theatre in the United States in two ways. Managers were forced to use work methods used in commercial enterprises. Having to compete, they started to advertise the performances and the stars of their companies and to do as much as possible to secure their income. On the other hand, the regulations concerning the theatre tried to secure the rights of theatergoers and the moral standards of the plays performed. These two forces, internal and external, culminated in three main issues in the theatre in its relation to the law: the rights and security of the theatergoers, the validity of the signed contracts, and copyright problems.[2]

People willing to buy tickets were almost the only source of income for theatres and it is not surprising that managers were trying to get as much money as possible by means of reducing costs. Therefore, during the second half of the nineteenth century courts were quite busy with cases concerning the rights of the audience.

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[1] D.B.Wilmeth and T.L. Miller, (eds), *Cambridge Guide to American Theatre*, Cambridge University Press: Cambridge 1993; G.B. Wilson, *Three Hundred Years of American Drama and Theatre, from Ye Bare and Ye Cubb to Chorus Line*, Prentice-Hall, Englewood Cliffs 1983, pp. 25–30; A. Laufe, *The Wicked Stage, A History of Censorship and Harassment in the United States*, New York 1978, pp. 15–17.

[2] G.B. Bryan, *American Theatrical Regulation, 1607–1900: Conspectus and Texts*, Metuchen 1993, pp. ix–xi.

One of the most important rights was the right to enter the theatre and watch a performance. In a couple of cases the court decided the ticket is a kind of contract between the buyer and the theatre manager, according to which the buyer is entitled to see or hear the play. Any refusal to allow the ticket holder to enter the theatre was regarded as a breach of contract, for which legal redress could be sought.[3]

This right, however, was not irrevocable. The manager could, in some cases, refuse to allow the ticket holder to see the performance. In the case *McCrea v. Marsh*, held in Massachussetts, the court settled an argument between a black man, Julian McCrea, and the theatre manager, Robert Marsh. McCrea presented a ticket, but the doorkeeper refused to admit him into the auditorium. The court ruled that the ticket was only an executory contract that could be revoked by the manager, but McCrea could sue for the price of the ticket as well as damages incurred by this breach of contract.[4]

The managers could make some restrictions concerning the ticket; for example, they could issue them as non-transferable or non-returnable. However, they were obliged by the court to specify all the conditions and advertise them publicly. These restrictions were usually made because of the managers' willingness to protect the theatergoers, and their goal was to prevent the tickets from being re-sold by speculators "on the sidewalk."[5]

Spectators at theatres had the right to expect protection from any injury caused by the performance or by the condition of the building in which the performance took place. For example, losses caused by dripping wax or by falling decorations were to be compensated by the manager.[6]

The court assured the right of the spectators to express their feelings during the performance. They were allowed to criticize the play or performance in a fair manner, even to the point of exaggeration. (They could applaud or hiss any play, but people going to the theatre with the explicit purpose of interrupting the performance and making a disturbance were guilty of inciting a riot.) This right was also applied to the newspapers. They had the right to publish fair and reasonable comments, however severe, and such publication was considered to be a kind of privileged communication for which no action could be taken without proof of actual malice.[7]

One of the most important concerns of the managers were the safety of the audience. During the second half of the nineteenth century the most dangerous accidents in the theaters were caused by fire. Therefore, states issued their own regulations, which aimed at increasing the safety of the audience and of the building itself.

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[3] Ibidem, p. 102.

[4] S.A.Wandell, *The Law of the Theatre: A Treatise upon the Legal Regulations of Actors, Managers and Audiences*, Albany, NY, 1891, p. 221.

[5] J.A. Brackett, *Theatrical Law: The Legal Rights of Manager, Artist, Author and Public in Theatre, Places of Amusement, Plays, Performances, Contracts, and Regulations*, Boston 1907, pp. 177, 179, 197.

[6] Ibid., p. 120.

[7] Ibid., p. 231; G.B. Bryan, op.cit., p. 105.

As a result, the spectators were not allowed to remain in the passageways and it was strictly forbidden to admit more people than the theatre was intended to hold.[8]

Due to all these regulations the theatergoer could feel safe in the nineteenth century theatre and was assured that once he bought a ticket he could freely and safely enter the theatre and exit after the performance.

If the theatre ticket was considered to be a kind of contract which should be fulfilled, it was obvious that the contracts between theatre managers and artists were also, and even more strictly, observed. The manager–the person who prepared the performance and invested his own money–had to be assured of his right to use the actors and actresses in performances. Unlike in Europe, the American actor, once he had signed the contract, had very limited rights in choosing the plays or places for his performances. (Of course, the stars of the American theatre might secure their right to do so, but their position was different.) Therefore, the actors were not allowed to perform outside the manager's theatre. They always had to ask for permission to play in charity performances. The failure to obtain permission was treated as a breach of contract and the manager could impose a proper fee on the actor/actresses. In several cases the court decided that an agreement to appear under one management for a certain period of time implied that the actor should "render exclusive personal services" while the contract was in force.[9] In this way the manager could be sure that the person he employed would not appear in any other theater and could not create a kind of self-competition. He could also be sure that the money he had invested in finding, preparing and employing the actor or actress would not be lost in an unfair way. Of course, the performance was only the last stage of preparing the spectacle; therefore, the court decided that the theatre artists were bound to attend all the necessary rehearsals. This, however, had to be stipulated in the contract. Otherwise, actors could not be forced to attend.[10]

The managers were not the only party protected by the law. Actors and actresses also had their rights. One of the most important rules was that they were not merely clerks or workers and that their success depended upon performing continually before the public. Thus, if they were engaged to perform, and their object in seeking the engagement was to distinguish and advance themselves in their profession, managers could not compel them to remain idle during the season, even if they paid or offered to pay them salaries agreed upon in the contracts. In this way the actors and actresses were legally assured of increasing their natural abilities and achieving their goal – the perfection of stagecraft.[11]

If an actor was engaged for a certain period of time, the manager could not break the contract without giving two weeks' notice, unless otherwise agreed upon in the contract. Because of this regulation, the artist could be certain of the salary he or she would earn during the theatrical season.[12]

Since it was well known that the versatile managers had better knowledge of the law and theatre regulations concerning contracts, the court decided that actors or

[8] Ibid., p. 73.
[9] Ibid., p. 96.
[10] S.A. Wandell, op.cit., pp. 140–141; G.B. Bryan, op.cit., p. 97.
[11] S.A. Wandell, op.cit., pp. 99, 166.
[12] G.B. Bryan, op.cit., p. 91.

actresses with little knowledge of business matters had to be advised of all facts concerning the contracts by managers. The decisions of the court helped to clarify the relations of actors and managers, enabling them to establish fair working arrangements.[13]

The spectator, the manager, and the actor were not the only ones involved in preparing and presenting the performances. The playwrights also had to struggle to ensure their rights to be paid properly for their work. The copyright issue was resolved by federal legislation. The first act, from May 31, 1790, was issued "for the encouragement of learning," and stated that a citizen-author would be protected for fourteen years after registration of the title. This applied only to printed dramas. Many plays, however, were only performed; therefore, the authors could not be guaranteed of their fees. Noticing the dissatisfaction of dramatists, on August 18, 1856 Congress issued an act which stated that dramatic compositions deposited in the Smithsonian Institution and the Library of Congress may be copyrighted, and which assigned performance and publication rights to their authors. Any unauthorized reprint or representation was forbidden.

It was soon discovered that the method of claiming the dramatists' rights was costly and it was very hard to obtain reimbursement from pirating managers and publishers. Therefore, in 1870 Congress once again issued an act which tried to simplify the process of registering and extended the copyright law to musical compositions. The copyright law, however, applied only to the citizens of the United States; the reproductions of any foreign book, drama or music was still legal. This changed for the first time in 1891, when President Benjamin Harrison in a revised copyright law extended protection to citizens of Belgium, France, Great Britain, and Switzerland. This law was changed in 1897 in order to ensure the rights of the authors. However, Congress had no power to deal with the problem of uncopyrighted property. Therefore, the state legislatures had to deal with it. Between 1895 and 1905 the protection of copyrighted materials became law in 13 states, including New Hampshire, New York, Pennsylvania, New Jersey, California, Wisconsin, and Michigan (in chronological order).[14]

In a series of cases brought to the court by Dion Boucicault, the courts decided that all dramatic materials should be protected, not only the play as a whole, but also any part of it. It was also stated that any resemblance of the plot, not just the precise words or names, was against the copyright law of the United States. The court also ruled that dramatists would receive protection from common law that could not be obtained under the copyright statutes.[15]

Although the court decisions made it clear that all kinds of dramatic works, including operas, operettas, puppet plays, and pantomimes, were protected by the law, the ballet was not. In the case *Fuller v. Bemis* (1892) the court ruled that the dance "is not a dramatic composition because it does not tell a story." Therefore, theatrical dances could not be copyrighted, no matter how individualistic or how graphically described. The court also decided that no dramatist could expect the

[13] S.A. Wandell, op.cit., pp. 163–164.
[14] G.B. Bryan, op.cit., pp. 58–60.
[15] Ibid., pp. 115–116.

court to protect him from unauthorized reprints or representation if his plays or performances were irreligious, libelous, obscene, or immoral.[16]

The second half of the nineteenth century clarified the positions of audience, manager, actor and dramatist in American theatre. Federal and state legislation, as well as the ruling of the courts, made all duties, responsibilities, and privileges clear and well known. It was established that the theatre could be regarded as a kind of specific enterprise. (The specificity of the theatre lay in the assumption that the actors and actresses had the right of self advancement.) Theatrical regulations pushed the theatre in the direction of commercial entertainment, in which the investing producer or manager could be sure that no illegal action could diminish the possible profits.

It cannot be said that the regulations induced the change in American theatre during the second half of the nineteenth century, but they surely provided the impetus to increase the speed of such changes. Another factor which stimulated the changes in the theatre was the creation of an informal trust of theatre producers, called the *theatre syndicate* or *theatre trust.* Six producers form New York and Philadelphia (Charles Frohman, Marc Klaw, Abraham Erlanger, Alfred Hayman, Fred Nixon and Fred Zimmerman) gained control over almost the entire theatre industry in the United States within two years. They decided what was to be staged and they fought against the demands of actors, actresses, directors and other persons involved in creating the performance. Of course, they did not hesitate to pay enormous wages to the theatre stars they had hired. But all supporting actors/actresses were barely given enough money to live on. They were neither paid for rehearsals nor for shows with unsatisfactory ticket sales.[17]

Actors, however, decided to fight for their rights, especially for reasonable minimum wages. At first they founded the *Actors' Society,* which was initially unsuccessful. After its dissolution in 1913, 122 actors founded the actors' union called the *Actors' Equity Association.* The first victory of *Actors' Equity* was the successful strike of August 1919, causing the closure of 37 plays and preventing the opening of 16 others. Later, *Actors' Equity* signed contracts with theatre producers, guaranteeing minimum wages for both rehearsals and performances. Nowadays over 39,000 actors are part of this artists' union and no Broadway production can be staged with nonmembers. High wages compensate for the periods of time in which actors do not play.[18]

Thus actors gained a sense of stability. The relations between managers, actors, and dramatists, however, are still based upon regulations created before the 1920s. And there are no signs that the situation will change in the predictable future.

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[16] Ibid., p. 82 and 131; J.A. Brackett, op.cit., p. 58 and 86–87.

[17] D.B.Wilmeth and T.L.Miller, op.cit., p. 436.

[18] R.H. Wainscott, *Commercialism Glorified and Vilified: 1920s Theatre and the Business World,* [in:] *American Stage: Social and Economic Issues from the Colonial Period to the Present,* Cambridge: Cambridge University Press 1993, pp. 175–189. A. Woods, *Consuming the past: commercial American theatre in the Reagan era,* [in:] R. Engle and T.L. Miller (eds), op.cit., pp. 252–266.

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